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IN THE

Supreme Court of the United States

October Term, 1958

No. 919

ATLAS TRANSPORTATION COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Atlas Transportation Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 165 F. Supp. 392 and printed in the record of the court below (R. 20-28) and the opinion of the Court of Appeals affirming the order of the District Court is reported at 263 Fed. F 2d. 573, and printed in Appendix B, *infra*, pp. 28-33.

JURISDICTION

The opinion of the Court of Appeals affirming the order of the District Court was filed on February 12,

1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

In a suit for refund petitioner sought recovery of the entire highway motor vehicle use tax assessed and collected with respect to five highway motor vehicles used exclusively by petitioner as a common carrier of household goods on the ground that petitioner's use of said vehicles was specifically exempt from tax. The case was submitted on cross motions to the District Court, which ordered summary judgment for respondents. The Court of Appeals affirmed on the ground that the Treasury Regulations taxing all highway motor vehicles with two axles and unloaded weights of 13,000 pounds as if their taxable gross weights were 27,000 pounds are reasonable, regardless of actual gross weight, that the classification of motor vehicles is understandable, easy of application and "an intelligent balance of the accurate and the practical in accord with the Congressional intent," and that "no conclusive presumption of facts is involved" (*infra*, pp. 32-33). The questions presented are:

(1) Whether, under a threshold definition of the taxable (i.e., use of vehicles having a taxable gross weight of "more than 26,000 pounds,"), it is within the power of the Secretary of the Treasury to tax petitioner's use of motor vehicles on the basis of the "averaging" (i.e., 27,000 pounds) of weights for the "United States trucking industry as a whole" notwithstanding

(a) the undisputed fact that the gross weights of all of petitioner's motor vehicles were "substantially less than 26,000 pounds" and

(b) the admitted fact that 27,000 pounds was fixed by the Secretary of the Treasury as the "average" for a class of motor vehicles whose "actual fully loaded weights . . . normally vary from approximately 20,000 to 30,000 pounds"?

(2) Whether the conclusive prescription of taxable gross weights under the Treasury Regulations solely on the basis of unloaded weight and number of axles and without regard to the actual gross weight of taxpayer's motor vehicles is

(a) the administrative creation of an irrebuttable presumption of fact, and if so;

(b) is authorized by the taxing statute, and, if so,

(c) is in violation of due process of law?

(3) Whether an excise tax may be assessed on the basis of factual characteristics (i.e., gross weight of motor vehicles) which are admittedly not true of petitioner taxpayer but may be true of other unrelated taxpayers in the "United States trucking industry as a whole"?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves:

(1) Article I of the Constitution of the United States and the Fifth Amendment to said Constitution, printed in Appendix A (*infra*, p. 21).

(2) §§ 4481 and 4482 of the Internal Revenue Code, as amended, 26 U.S.C. 4482 (b) (Supp. V 1958), printed in Appendix A (*infra*, pp. 21-23).

(3) Treasury Regulations, §§ 41.4482 (b)-(c), excerpts printed in Appendix A (*infra*, p. 24).

(4) Revenue Ruling 57-499, 1957 I.R.B. 43, printed in Appendix A (*infra*, pp. 26-27).

STATEMENT OF THE CASE

This suit for refund was filed on October 31, 1957, under 28 U.S.C. 1346, and is also based upon Article I

of the Constitution of the United States and on the Fifth Amendment to the Constitution. Although the amount of the tax refund claim is small—$202.50, the entire amount of the excise tax paid on the use of five highway motor vehicles—as the court below pointed out in its opinion, "the point of law involved is important to it [taxpayer] and others similarly situated" in the moving industry (*infra*, p. 28).

Petitioner is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Philadelphia, Pennsylvania, and was at all relevant times the registered owner and operator of five motor vehicles of the two-axle van type. The motor vehicles were used by petitioner for the exclusive purpose of transporting household goods under authority from the Interstate Commerce Commission. Under such authority, petitioner is not permitted to use any of its motor vehicles except for transportation services classified as "household goods", as defined by the Interstate Commerce Commission in § 176.1(a) of its Motor Carrier Regulations (Appendix A, p. 25).

The highway motor vehicle use tax is imposed under § 4481(a) of the Internal Revenue Code of 1954, as amended (Appendix A, pp. 21-23), on the use of "any highway motor vehicle . . . which has a taxable gross weight of more than 26,000 pounds," at the rate of $1.50 a year for each 1,000 pounds taxable gross weight or fraction thereof." Under § 4482(b) of the Internal Revenue Code "taxable gross weight" is statutorily defined—insofar as this case is concerned—as the sum of two components, namely:

"(1) the actual unloaded weight of—

"(A) such highway motor vehicle fully equipped for service, and . . .

"(2) the weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle. . . ."

Under the authority to issue regulations for this tax, the Secretary of the Treasury issued T. D. 6216 (Treasury Regulations § 4.4482(b)-(c)) which prescribed a mandatory use tax schedule (Appendix A, p. 24), for motor vehicles classified into three broad categories—single units, combinations and busses. This case is concerned only with single units and the first subclass thereunder, named—"(A) 2 axled truck equipped for use as a single unit with actual unloaded weight of 13,000 pounds or more." Any motor vehicle falling within tax category "(A)", the Regulations provide, "shall be considered for purposes of the regulation in this part, to have a taxable gross weight" of 27,000 pounds.

On or about April 17, 1957, petitioner filed with the District Director of the Internal Revenue Service, Philadelphia 4, Pennsylvania, a claim for refund in the amount of $202.50 on U. S. Treasury Form 843, a copy of which was annexed to the complaint as Exhibit A, R. 7-8. The claim for refund was based on the grounds specifically stated therein that the computation of the amount of the motor vehicle use tax in accordance with the use tax schedule of the Treasury Regulations was arbitrary and unreasonable as applied to petitioner in that said use tax schedule conclusively fixed taxable gross weights on the basis of the number of axles of the trucks and the actual unloaded weight of such trucks without regard to the maximum weights customarily carried on such motor vehicles, according to the petitioner's records. More than six months having passed since the filing of the claim for refund without petitioner obtaining the relief claimed thereon, petitioner filed its complaint in the District Court (R. 2-14) on October 31, 1957.

An affidavit accompanying the complaint (R. 11-14) set forth that each of petitioner's five motor vehicles had an unloaded weight of 13,000 pounds or more, that the actual unloaded weight of the vehicles together with the maximum weight customarily carried by any of said vehicles "was substantially less than 26,000 pounds",[1] that all of the said motor vehicles were registered in Pennsylvania as class "W" vehicles with a maximum lawful gross weight of 26,000 pounds,[2] and that permits had been obtained from the State of New York for the use of said vehicles in New York with a gross weight not to exceed 26,000 pounds.[3]

The answer filed by respondents did not deny any of the essential matters of fact stated in petitioner's complaint or supporting affidavit, and attached an affidavit prepared by Mr. Carl Saal, an official of the Bureau of Public Roads, Department of Commerce. This affidavit stated (R. 35-36) inter alia:

"That in the United States trucking industry as a whole a two-axle van equipped for use as a single

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[1] The opinion of the Court of Appeals is unclear (*infra*, pp. 31-32) on whether it appreciated that the record before the trial court had established that all of petitioner's vehicles had gross weights of 26,000 pounds or less. The record (R. 13 ¶ 10) shows that petitioner's affidavit, which is here unchallenged, specifically asserted: "That the maximum weight customarily carried by any of said vehicles, together with the actual unloaded weight of any of said vehicles, was substantially less than 26,000 pounds."

[2] Under the laws of Pennsylvania, Act of May 1, 1939, P.S. 905, § 703, and § 903, as amended, 75 P.S. 272, 453, it was unlawful for plaintiff to operate any vehicle registered in the "W" classification on any highway in Pennsylvania with a gross weight in excess of 26,000 pounds.

[3] It was unlawful under the laws of the State of New York, ¶ 60, N.Y. Tax Law, Article 21, § 502 and § 512 (59 McKinney's N. Y., *Consol. Laws*, § 502) to operate or use any vehicle on the public highways of that State with a greater gross weight than the gross weight which was set forth (26,000 pounds) in permits issued to plaintiff for each of the five vehicles.

unit and having an actual unloaded weight of 13,000 pounds or more customarily has a loaded maximum weight of 27,000 pounds. That the actual fully loaded weights of such vehicles *normally vary from approximately 20,000 to 30,000 pounds.*" (Emphasis added)

The case was submitted on cross motions, affidavits and oral argument on March 24, 1958; and on September 15, 1958, the District Court entered summary judgment for respondent (R. 20-28). The Court of Appeals affirmed the order of the District Court on February 12, 1959 (*infra*, pp. 28-33).

REASONS FOR GRANTING THE WRIT

As in the companion case of *North American Van Lines, Inc. v. United States*,[4] October Term, 1958, No. 838, petitioner in seeking a writ of certiorari must overcome the formidable hurdle that there is no conflict in result among the courts below with respect to the validity of the highway motor vehicle use tax regulations of the Treasury Department. The Court of Appeals has held: (a) that the Secretary of the Treasury is required to assess the new excise tax on the basis of "averaging", regardless of the range of weights that make up the "average", and is accordingly authorized in "bringing it [petitioner's vehicle] into the group of vehicles subject to taxation" regardless of the undisputed fact that the weights of petitioner's vehicles were substantially less than 26,000 pounds, (b) that the

[4] *North American* involves motor vehicles classified as "combinations," that is, truck-tractors used in combination with semi-trailer vans (tax categories "E" and "F" of the Treasury use tax schedule), whereas this case involves only "single-unit" two-axle motor vehicles (tax category "A"). Moreover, petitioner taxpayer here contends that the entire amount of the highway motor vehicle use tax is refundable on the ground that its motor vehicles are specifically exempt from tax under the statutory exemption of motor vehicles having a taxable gross weight of 26,000 pounds or less, whereas in *North American* petitioner taxpayer claimed only a partial refund of the tax, admitting that part of the tax had been lawfully assessed and collected.

classifications of the Treasury use tax schedule were "not reached in solitary armchair speculation" but are understandable, easy of application and represent "an intelligent balance of the accurate and practical in accord with the Congressional intent"[5]; and (c) that it "is not accurate" for the taxpayer to argue that the regulations "provide a conclusive presumption contrary to actual fact."

The result below is a decision in conflict with many decisions of this Court; with *United States* v. *Calamaro*, 354 U. S. 351, 359, 1 L. Ed. 2d 1394, 77 S. Ct. 1138 (1957), which held that a Treasury Regulation can furnish "no sustenance of the statute" of "something which is not there"; with *Heiner* v. *Donnan*, 285 U. S. 312, 76 L. Ed. 772, 52 S. Ct. 358 (1932), which held that the due process clause of the 5th Amendment was violated by a conclusive presumption of a taxable fact, i.e., that a gift made within two years prior to death of the donor shall be construed to have been made in contemplation of death and consequently taxable as part of his estate at the time of death; with *Hoeper* v. *Tax Commission*, 284 U. S. 206, 52 S. Ct. 120, 76 L. Ed. (1931) which held invalid under the due process clause the attempt of a State to assess an income tax against a husband computed on the combined income of himself and his wife; with *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129, 80 L. Ed. 528, 56 S. Ct. 397 (1936) which held that the Treasury's power to prescribe rules and regulations does not include the power to make tax law and that a tax regulation must be consistent with the statutes and meet the test of reasonableness; and with *Crooks* v. *Harrelson*, 282 U. S. 55, 75 L. Ed. 156, 51 S. Ct. 49 (1930), and *White* v. *Aronson*, 302 U. S. 16, 82 L. Ed. 20, 58 S. Ct. 95 (1937), which held that in construing a taxing statute

[5] However, the District Court was critical of the statutory language of the tax. R. 27.

adherence to the letter applies with peculiar strictness, with doubts being resolved favorably to the taxpayer.

The central issue is the statutory and constitutional powers of the Secretary of the Treasury, in the exercise of his rule-making power under a taxing statute, to assess an excise tax on the basis of "averaging"[8] (*infra*, p. 32) so that the coverage of this excise tax is extended to incidents (i.e., gross weight of motor vehicles used on highways) which on their undisputed facts are outside the specific statutory threshold of what is taxable. While the taxing statute specifically drew the taxable line at gross weights of "more than 26,000 pounds," respondent had admitted in its affidavit that the Secretary of the Treasury had fixed the taxable gross weight for tax category "A" at 27,000 pounds by averaging "the actual fully loaded weights of . . . vehicles [which] *normally vary from approximately 20,000 to 30,000 pounds*" (R. 35-36, emphasis added). In concluding that the Treasury Regulations were nonetheless reasonable, the courts below ignored this frank admission by respondent, presumably on the ground that the admission was irrelevant, i.e., the range of incidents out of which the "average" was constructed by the Secretary of the Treasury is irrelevant to any challenge of the validity of such "average" by a taxpayer.

By so disposing of petitioner's complaint against being brought "into the group of vehicles subject to taxation" (*infra*, p. 31), the court made it impossible for any taxpayer to challenge the drawing of the line between what is taxable and what is tax exempt. Under the theory of the courts below, that line has no point in observable reality; it remains a fictional construct of the "averaging" power of the Secretary of the Treasury

[8] The general issue is essentially the same as that raised in *North American* by the holding of the Court of Claims that the Secretary of the Treasury was permitted to make "generalization" in assessing the new excise tax. 169 F. Supp. 252, 255.

which is beyond testing in the courts. That is indeed endowing the Secretary of the Treasury with an unreviewable power to tax as he pleases.[7]

As in *North American*, petitioner contends that respondent is without statutory[8] authority to prescribe a *mandatory* conversion table for determining taxable gross weights (from the actual unloaded weight of the highway motor vehicle and the number of its axles) that are unrelated to the actual gross weight of petitioner's vehicles. Petitioner further contends that if respondent has the statutory authority, or the obligation, as the court below suggested, to prescribe a mandatory table of taxable gross weights, then a constitutional issue is presented, under the only decided cases of this Court (*infra*, p. 17), as to the power of respondent to create administratively what is essentially an irrebuttable presumption of fact for purposes of the convenience of tax administration—to wit, that a highway motor vehicle of an unloaded weight of 13,000 pounds "shall be considered . . . to have a taxable gross weight" of 27,000 pounds regardless of the actual gross weight of petitioner's motor vehicles. This constitutional problem may never be reached if the taxing statute is construed adversely to the interpretation asserted by the Secretary of the Treasury in his use tax schedule.

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[7] In its brief in the District Court, respondent unabashedly argued that since the statutory concept of "taxable gross weight" originated in and is defined by § 4482 of the Internal Revenue Code, as amended, whatever interpretation is made of this concept by the Commissioner of Internal Revenue is "true by hypothesis." This doctrine of the infallibility of the Commissioner of Internal Revenue was not averted to in the opinion of the District Court; nor was the argument nakedly phrased in this form by the Court of Appeals. It remains, however, as the true, if embarrassingly frank, description of respondent's justification of the Treasury Regulations under the highway motor vehicle use tax.

[8] From a logical standpoint, the statutory standard involves a contradiction between the "maximum" and the "customary" and to that extent may be invalid as an impossibly indefinite guide to the tax collector and the taxpayer alike.

Our reasons in detail are:

1. ***By only taxing the use of highway motor vehicles having a taxable gross weight of "more than 26,000 pounds," the Internal Revenue Code precludes the Secretary of the Treasury from "averaging" up into the taxable class vehicles whose gross weights "normally vary" below the statutory threshold of 26,000 pounds.*** From the wording of the taxing statute, *infra*, p. 21, two incontestible conclusions emerge—(1) highway motor vehicles are subject to the new excise tax only if they have a taxable gross weight of *more than 26,000 pounds* and (2) the amount of the new excise tax varies with the "pounds of taxable gross weight," by multiples of 1,000 pounds. The taxing statute says nothing about imposing the tax on unloaded weight alone, on the number of axles, on the size of the motor vehicles, or any other factor than the taxable gross weights of the motor vehicle. Here it was undisputed on the record that petitioner taxpayer's vehicles had gross weights of "substantially less than 26,000 pounds" (*supra*, p. 6), whereas the taxing statute applies only to vehicles having taxable gross weight of "more than 26,000 pounds." Why then are not petitioner taxpayer's vehicles exempt from the tax under this specific statutory language?

The court below answered that the regulations made petitioner's vehicles taxable and that the regulations were sustained on the basis of the respondent's affidavits, quoted *supra*, pp. 6-7, from which the court below concluded that the Treasury classifications "were not reached in solitary armchair speculation" and were reasonable (*infra*, pp. 31-32). In quoting ¶ 12 of the affidavit of respondent's expert, the court below omitted entirely the immediately following sentence from that paragraph of the affidavit, which reads: "That the actual fully loaded weights of such vehicles *normally vary from approximately 20,000 to 30,000 pounds.*" (Emphasis added)

Presumably this admission by respondent's expert was suppressed by the court below on grounds of relevancy under its view that the taxing statute required the tax to be assessed on the basis of "averaging"; and the factual range within the "average", as stated by respondent's own expert, was, it must be inferred from the opinion of the court below, beside the point. This is factually convenient if any "average" computed by the Secretary of the Treasury is to be treated as "true by hypothesis," as respondent had baldly argued in the District Court, *supra*, p. 10, n. 7.

The courts below found, apparently, nothing wrong in the fact that the Treasury "average" for a range from 20,000 to 30,000 pounds was fixed at 27,000 pounds rather than the midpoint of 25,000 pounds. Of course, if the midpoint under a normal distribution curve had been used, the entire group of motor vehicles would have been tax exempt, since the threshold of the tax does not begin to operate until the gross weight is "more than 26,000 pounds." In selecting the figure of 27,000 pounds for a range from 20,000 to 30,000 pounds the Secretary of the Treasury was plainly endeavoring to maximize the revenues by bringing within the taxable group the maximum number of uses of highway motor vehicles.

Nor did the courts below, apparently, see anything wrong in a concept of "averaging" by the Secretary of the Treasury which includes in the class of motor vehicles to be averaged, as respondent's expert has frankly conceded, many motor vehicles whose gross weights fall outside the statutory threshold of the tax, i.e., motor vehicles whose gross weights "normally vary from approximately 20,000 to 30,000 pounds" (*supra* p. 7). Petitioner need not quarrel with the concept of an average per se (*infra*, p. 15, n. 11) for tax category "A" that would be based on vehicles whose gross weights would "normally vary from approximately . . . [26,000] to 30,000 pounds."

Petitioner, however, does quarrel with an "average" that admittedly straddles the line of the taxable and the nontaxable. The inclusion within the "average" computation of motor vehicles whose weights "normally vary from approximately 20,000 pounds to" 26,000 pounds, presents the question of the naked power of the Secretary of the Treasury so to do under a taxing statute which contains a threshold definition of the taxable that starts at "more than 26,000 pounds."

The answer in the court below was that a "reading of the statutory definition of 'taxable gross weight', reveals not only that averaging is permitted, but it is required" (*infra* p. 32). This is obviously only a partial answer to the question posed by petitioner, for the court below studiously ignored the question whether the statutory exemption of motor vehicles having a taxable gross weight of 26,000 pounds or less placed any limitation on the "averaging" power of the Secretary of the Treasury. Petitioner contends, of course, that the taxing statute so limits the Secretary of the Treasury that he may only average the weights of highway motor vehicles that are in fact in the class subject to taxation under the taxing statute and that he may not lawfully compute the averages by including vehicles whose normal gross weights are concededly below the threshold definition of what is statutorily taxable.

Through the mechanics of the mandatory use tax schedule and the oddest sort of "averaging"[9] the Secretary of the Treasury has converted the highway motor vehicle use tax, which Congress imposed on the use of

[9] In addition to the "skewed" averaging already described supra, p. 12, the Secretary of the Treasury in *North American* set the "average" for tax category "F" at 50,000 pounds for vehicles whose "actual fully loaded weights normally vary from approximately 34,000 pounds to 52,000 pounds," or just 2,000 short of the maximum range of instances, which varied by 18,000 pounds. Petition, p. 19.

motor vehicles having a "taxable gross weight" of more than 26,000 pounds, into a tax measured under the Treasury Regulations exclusively upon the basis that a two-axled vehicle has an unloaded weight of 13,000 pounds. In so doing the Secretary of the Treasury has extended the tax to cover vehicles whose normal weights are below the statutory threshold of the tax, which specifically taxes only vehicles having taxable gross weights of more than 26,000 pounds. A Treasury Regulation can furnish "no sustenance" to a taxing statute "of something which is not there." *United States* v. *Calamaro*, 354 U.S. 351, 359, 1 L. Ed. 2d 1394, 77 S. Ct. 1138 (1957). By so doing in the guise of rule making the Secretary of the Treasury has in effect levied a new type of tax from that imposed by the Congress. This is the exercise of power beyond the statutory delegation given to the Secretary of the Treasury by the Congress and beyond the constitutional power of the Congress to delegate to the Secretary of the Treasury. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 80 L. Ed. 528, 56 S. Ct. 397 (1936).

If the Congress had "the purpose assigned by the Commissioner" of providing for the assessment of the new tax on the use of motor vehicles according to the number of axles and the unloaded weight of motor vehicles, Congress "should have declared it." *Shwab* v. *Doyle*, 258 U.S. 529, 536, 66 L. Ed. 747, 42 S. Ct. 391 (1922). Congress did not do so. Nor did any legislative history[10] suggest that the tax base be conclusively assigned on the basis of unloaded weight and the number of axles.

The District Court summarily concluded, without disclosing the steps in its reasoning process, that Congress had the clear intention to measure the new excise tax on a factor other than actual gross weight. Respond-

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[10] The courts below cited no legislative history. Nor did the Court of Claims in *North American*. Petition, p. 13.

ent's brief in the Court of Appeals below endeavored to supply a connecting rationale by arguing from an admittedly sparse legislative history[11] and from other non-tax legislation[12] enacted by Congress in 1956

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[11] The brief of respondent in the Court of Appeals gave the legislative history as follows:

> "As indicated above, this tax is imposed on the basis of the 'taxable gross weight' of a highway motor vehicle. 'Taxable gross weight' generally is the unloaded weight of the highway motor vehicle fully equipped for service together with any semitrailer or trailer equipped for service *customarily used in connection with motor vehicles of the type in question whether or not so used in connection with a particular vehicle with respect to which the tax is imposed.* The term 'taxable gross weight' also includes the weight of the maximum load *customarily carried by vehicles of the type in question* (and on the semitrailers or trailers) *whether or not a particular vehicle actually carries a maximum load of this size. In practice it is anticipated that the Treasury Department will develop formulas or classifications for determining the weight of different types of trucks and buses for the purpose of this tax.*" (Emphasis supplied by respondent). (S. Rep. No. 2054, 84th Cong., 2d Sess., p. 8 1956-2 Cum. Bull. 1308, 1313).

The most that this sparse legislative history establishes is that Congress had in mind that the tax could be based on some system of averages rather than being measured by the weight of each particular motor vehicle. Petitioner has at no time contended that a system of averaging is per se invalid and concedes that the Secretary of the Treasury may provide a reasonable weight classification within which various types of motor vehicles subject to the tax may be grouped, provided that such classification bears a reasonable relationship to the actual gross weights involved in the use of motor vehicles by petitioner taxpayer or others similarly situated.

But plainly no averaging system can convert a tax-exempt use into a taxable use, i. e., a vehicle having in fact a maximum gross weight of 26,000 pounds or less cannot be treated for tax purposes as if it had a taxable gross weight of more than 26,000 pounds.

[12] Respondents also had cited §§ 209 and 210(b)(2) of the Federal Aid Highway Act of 1956, 70 Stat. 374, for the purpose of showing that the excise tax could be measured by some factor other than weight alone, citing "size" and "frequency of occur-

that Congress intended to measure the new excise tax on the use of motor vehicles by some factor other than weight alone, citing "size" and "frequency of occurrence of the traffic stream." These factors were but briefly recited by the courts below (*infra*, p. 32) which omitted any reference to legislative history and to respondent's specific arguments.

2.[13] *The mandatory "averaging" of weights under the Treasury use tax schedule creates an irrebuttable presumption of fact, contrary to the undisputed facts of petitioner taxpayer, without authorization under the Internal Revenue Code, and in violation of the due process clause.* Under Revenue Ruling 57-499, 1957 I.R.B. 43, (Appendix A, pp. 26-27) the Treasury Department has stated that taxable gross weight for purposes of the highway use tax "must be computed in accordance with the schedule of the taxable gross weight" without regard to the "actual gross maximum weight of a particular vehicle." Thus, petitioner's vehicles were classified in tax category "A" and conclusively assigned a taxable gross weight of 27,000 pounds, notwithstanding the undisputed fact that their actual gross weight range substantially below 26,000

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rence of the traffic stream." The only provision of these non-tax acts that bear any relationship, however oblique, to factors other than the weight of motor vehicles is § 210(b)(2), which authorizes the Secretary of Commerce to make studies to be submitted to the Congress in 1961 Act of August 28, 1958, P.L. 85-823, 72 Stat. 983. Under our constitutional system, however, the power of the Secretary of Commerce to study, investigate, and report in 1961, cannot be converted into a power of the Secretary of the Treasury to tax with respect to liabilities accruing for the months of July through November, 1956.

[13] The remaining arguments parallel in content and phrasing the arguments already made in the companion case of *North American Van Lines, Inc.* v. *United States*, October Term, 1958, No. 838, and will to that extent appear repetitious of the arguments advanced therein. Since these cases arose in the Third Circuit and in the Court of Claims and not within a single Circuit, it was not possible under the Rules of this Court to file a consolidated petition.

pounds (R. 13), the threshold definition of the tax at "more than 26,000 pounds." This is a conclusive or irrebuttable presumption of fact, established by administrative fiat of the Secretary of the Treasury. There is nothing in the statutory language of §§ 4481-82 of the Internal Revenue Code which authorizes the Secretary of the Treasury to establish any such conclusive presumption of fact, however convenient such a convenient presumption may be for purposes of the revenue. The legislative or administrative creation of a conclusive presumption of fact for purposes of tax administration is unconstitutional. *Heiner* v. *Donnan*, 285 U.S. 312, 76 L. Ed. 772, 52 S. Ct. 358, (1932).

The answer of the District Court below was that the presumption of the Treasury Regulation "is harmless" (R. 27) and the answer of the Court of Appeals below is that petitioner's argument is "not accurate . . . No conclusive presumption of fact is involved" (*infra*, p. 33). Neither court below recognized that but for the Treasury's presumption that petitioner's vehicles are conclusively considered to have a "taxable gross weight" of 27,000 pounds, petitioner would not be subject to the excise tax, inasmuch as the actual weight of its vehicles was less than 26,000 pounds, the statutory threshold of the new tax. To be converted from a non-taxable user of motor vehicles into a taxable user of motor vehicles by a conclusive presumption of the Treasury is no "harmless" act.

Perhaps the court below rationalized its conclusion that no conclusive presumption of fact is involved by considering "taxable gross weight" as a type of phenomenon that is "non-fact," or fiction. But did Congress authorize the Secretary of the Treasury to assess the tax on "non-fact" or fiction?

3. *A Treasury Regulation cannot be justified against a challenge of arbitrariness in its application to peti-*

tioner taxpayer on the ground that it may be fair to other taxpayers or to "the trucking industry as a whole." The court below endeavored to justify the taxation of petitioner's use of motor vehicles under the Treasury Regulations on the ground that the same "type" of motor vehicle (defined in terms of unloaded weight and number of axles) may be used by other taxpayers (who are not engaged in hauling household goods) to carry heavier loads, and that petitioner was not entitled to a special classification any more than were truckers hauling pretzels (*infra* p. 33). Petitioner knows of no facts or any statutory or regulatory practice which would justify a special classification for trucks hauling pretzels. But there are many statutes of the various States [14] which provide for a special classification of household goods carriers; and this is a classification well recognized under the regulations of the Interstate Commerce Commission (Appendix A, p. 25). However, petitioner is not urging that the Treasury use tax schedule must contain special clas-

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[14] See *California*, Public Utilities Code, § 1036, which provides that the issuance and transfer of permits to household goods carriers are $100.00 and $50.00 respectively, whereas the issuance and transfer of certificates for other carriers are fixed at $150.00; *Georgia*, Laws, 1955, Act 412, § 1.6, which fix registration fees and taxes for movers at generally at one-half the fees and taxes applicable to "for-hire" carriers; *Louisiana*, Revised Statutes, 47:462, which provides that the license fee for movers are 75% of the ordinary truckers' fees; *Michigan*, Laws 1955, Act 87, § 3, which provide for reduced rates on license plates for movers; *Mississippi*, Code § 9352-06, which provides for a tax reduction of 2/3rds to 1/2 for movers; *Ohio*, Revised Code § 2728.13, which provides for a reciprocal waiver of the axle-mile tax for non-resident movers, but no waiver is available for other types of motor carriers; *Tennessee*, Act 1957, Ch. 284, which provides for registration fees for household goods carriers that are from 63 to 78% of the fees of common and contract carriers.

The Province of *Alberta*, Canada, provides in Regulation R1-54 under the Public Service Vehicles Act that the maximum gross weight fees for vehicles employed solely in the transportation of household goods, shall be 75% of the maximum weight computed for all other carriers.

sification for carriers of household goods. It urges only that the Treasury Regulations should be reasonable in their application to petitioner as a carrier of household goods.

Under our Constitution the tax on any taxpayer is to be determined by the facts relating to that taxpayer alone and cannot be determined on the basis of facts that may apply to *other unrelated* taxpayers. *Hoeper* v. *Tax Commission*, 294 U.S. 206, 52 S. Ct. 120, 122, 76 L. Ed. 248 (1931).

CONCLUSION

An *unrestrainable* executive power to draw the line between the taxable and the non-taxable on the basis of fiction rather than fact necessarily imports the danger of a power of the Secretary of the Treasury to tax de facto. We believe that no such power can be exercised by the Secretary of the Treasury under our Constitution.

This Court has not heretofore passed on taxation by compulsory "averaging." To the extent that "averages" have so far been used in tax administration, they have been alternative techniques applied by either the taxpayer (the Cohan rule)[15] or the tax collector (net worth prosecution)[16] in the absence of the better alternative of unquestioned records of supporting details. Here the Secretary of the Treasury has insisted on assessing the excise tax on the use of highway motor vehicles exclusively by way of "averaging" for a host of unrelated taxpayers—"the trucking industry as a whole" (R. 35)—and has applied the resulting "average" to the use by petitioner taxpayer of five highway motor vehicles whose gross weights were admittedly below the statutory thresh-

[15] *Cohan* v. *Commissioner*, 39 F. 2d 540 (1930). Also see cases cited by Mertens, *Law of Federal Income Taxation*, § 25.04.

[16] Mertens, *op. cit.*, § 12.12.

old of the tax, if that threshold is based on the facts applicable to petitioner taxpayer. This is a novel and significant executive assertion of the taxing power that merits the careful consideration of this Court.

It is for this reason that the issues here presented are important to all taxpayers, and not merely to this petitioner, whose annual stake is but $202.50. If the tax collector can expand the class of the taxable by facilely drawing "averages" as he pleases and can successfully defend the resulting increase in tax coverage on grounds of practicality or convenience—rather than on what Judge Hand termed "the Word" of the taxing statute [17]—then a new dimension of executive power has arrived, unannounced by either the Constitution or the Congress.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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[17] *Ungar, Inc.* v. *Commissioner*, 244 F.2d. 90, 94 (CCA. 2d 1957).

APPENDIX A

Constitution of the United States

Article I, Section 8:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Amendment V.:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code

Sec. 4481. [as added by § 206, Highway Revenue Act of 1956, c. 462, 70 Stat. 374, 387]

(a) Imposition of Tax.—A tax is hereby imposed on the use of any highway motor vehicle which (together with the semitrailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle) has a taxable gross weight of more than 26,000 pounds, at the rate of $1.50 a year for each 1,000 pounds of taxable gross weight or fraction thereof.

(b) By Whom Paid.—The tax imposed by this section shall be paid by the person in whose name the highway

motor vehicle is, or is required to be, registered under the law of the State in which such vehicle is, or is required to be, registered, or, in case the highway motor vehicle is owned by the United States, by the agency or instrumentality of the United States operating such vehicle.

(c) Proration of Tax.—If in any year the first use of the highway motor vehicle is after July 31, the tax shall be reckoned proportionately from the first day of the month in which such use occurs to and including the 30th day of June following.

(d) One Payment per Year.—If the tax imposed by this section is paid with respect to any highway motor vehicle for any year, no further tax shall be imposed by this section for such year with respect to such vehicle.

(e) Period Tax in Effect.—The tax imposed by this section shall apply only to use after June 30, 1956, and before July 1, 1972.

Sec. 4482 Definitions

(a) Highway Motor Vehicle.—For purposes of this subchapter, the term "highway motor vehicle" means any motor vehicle which is a highway vehicle.

(b) Taxable Gross Weight.—For purposes of this subchapter, the term "taxable gross weight", when used with respect to any highway motor vehicle, means the sum of—

(1) the actual unloaded weight of—

(A) such highway motor vehicle fully equipped for service, and

(B) the semitrailers and trailers (fully equipped for service) customarily used in connection with highway motor vehicles of the same type as such highway motor vehicles, and

(2) the weight of the maximum load customarily carried on highway motor vehicles of the same type

as such highway motor vehicle and on the semitrailers and trailers referred to in paragraph (1)(B).

Taxable gross weight shall be determined under regulations prescribed by the Secretary or his delegate (which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise).

(c) **Other Definitions.**—For purposes of this subchapter—

(1) State.—The term "State" means a State, a Territory of the United States, and the District of Columbia.

(2) Year.—The term "year" means the one-year period beginning on July 1.

(3) Use.—The term "use" means use in the United States on the public highways.

TREASURY REGULATION ON HIGHWAY MOTOR VEHICLES USE, § 41. 4481-1 (T.D. 6216)

USE TAX SCHEDULE

	Taxable gross weight (in pounds)
1. Single Units:	
(A) 2 axled truck equipped for use as a single unit with actual unloaded weight of 13,000 pounds or more	27,000
(B) 3 or 4 axled truck equipped for use as a single unit with actual unloaded weight of at least 13,000 pounds and less than 16,000 pounds	30,000
(C) 3 or 4 axled truck equipped for use as a single unit with actual unloaded weight of 16,000 pounds or more	40,000
2. Combinations:	
(D) 2 axled truck-tractor with actual unloaded weight of at least 5,500 pounds and less than 7,000 pounds	30,000
(E) 2 axled truck-tractor with actual unloaded weight of at least 7,000 pounds and less than 9,500 pounds	40,000
(F) 2 axled truck-tractor with actual unloaded weight of 9,500 pounds or more	50,000
(G) 2 axled truck with actual unloaded weight of at least 9,000 pounds and less than 12,000 pounds and equipped for use in combinations	40,000
(H) 2 axled truck with actual unloaded weight of 12,000 pounds or more and equipped for use in combinations	55,000
(I) 3 or 4 axled truck equipped for use in combinations	60,000
(J) 3 or 4 axled truck-tractor	60,000

3. Buses:

Actual unloaded weight of vehicle plus 150 pounds for each unit of seating capacity provided for passengers and driver.

Any highway motor vehicle which falls in one of the categories shown in such schedule shall be considered, for purposes of the regulations in this part, to have the taxable gross weight assigned to such category. Any highway motor vehicle which does not fall in one of the categories shown in such schedule shall be considered, for purposes of the regulations in this part, to have a taxable gross weight of 26,000 pounds or less.

Motor Carrier Regulations of Interstate Commerce Commission, Relating to Transportation of Household Goods in Interstate or Foreign Commerce, as amended, CCH. Federal Carriers Reporter, para. 1056.

"Sect. 176.3 Determination of weights—(a) *Loaded weight; tare weight, and constructive weight.* (1) Each common carrier by motor vehicle shall determine the tare weight of each vehicle used in the transportation of household goods by having it weighed prior to the transportation of each shipment, without the crew thereon, by a certified weighmaster or on a certified scale, and when so weighed the gasoline tank on such vehicle shall be full and the vehicle shall contain all pads, chains, dollies, hand trucks, and other equipment needed in the transportation of such shipment. After the vehicle has been loaded, it shall be weighed, without the crew thereon, at point of origin of the shipment, and the net weight of the shipment shall be obtained by deducting the tare weight from the loaded weight. Where no adequate scale is available at point of origin, the loaded weight shall be obtained at the nearest certified scale in the direction of the movement of the shipment.

(2) If no adequate scale is available at any point en route or at destination, *a constructive weight based upon 7 pounds per cubic foot of properly loaded van space, may be used.* (Emphasis supplied)

(b) *Part loads.* In the transportation of part loads, this section shall apply in all respects, except that the gross weight of a vehicle containing one or more part loads may be used as the tare weight of such vehicle as to part loads subsequently loaded thereon: A part load for any one shipper not exceeding 1,000 pounds may be weighed on a certified scale prior to being loaded on the vehicle.

(c) *Weight ticket.* Whenever weights are required to be obtained pursuant to this part, the carrier shall cause to be executed a weight ticket, in the form specified below, and such weight ticket shall be maintained by the carrier as part of its record of shipment."

. . . . .

Revenue Ruling 57-499, I. R. B. 1947-43, 34.

The Internal Revenue Service has been asked whether the highway motor vehicle use tax may be computed on the basis of the *actual gross maximum weight* of a particular vehicle rather than the *taxable gross weight* assigned to it in the schedule of taxable gross weights set forth in the Highway Motor Vehicle Use Tax Regulations.

Section 4481(a) of the Internal Revenue Code of 1954 imposes a tax on the use of any highway motor vehicle which has a taxable gross weight of more than 26,000 pounds.

Section 4482(b) of the Code provides as follows:

> TAXABLE GROSS WEIGHT—For purposes of this subchapter, the term "taxable gross weight", when used with respect to any highway motor vehicle, means the sum of—
>
> (1) the actual unloaded weight of—
>
> (A) such highway motor vehicle fully equipped for service, and
>
> (B) the semitrailers and trailers (fully equipped for service) customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle, and
>
> (2) The weight of the maximum load customarily carried on highway motor vehicles of the same type as such highway motor vehicle and on the semitrailers and trailers referred to in paragraph (1)(B).
>
> Taxable gross weight shall be determined under regulations prescribed by the Secretary or his delegate (which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise).

It will be noted that section 4482(b) of the Code provides that the taxable gross weight shall be determined under regulations prescribed by the Secretary of the Treasury or his delegate and that such regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise.

Pursuant to the authority granted in section 4482(b) of the Code, a schedule of taxable gross weights is set forth in section 41.4482(b)-1(c) of the regulations. Highway motor vehicles are classified under this schedule according to the number of axles, the actual unloaded weight, and the type of vehicle (whether equipped for use as a single unit or in combinations).

Accordingly, it is held that the tax imposed by section 4481 of the Code must be computed in accordance with the schedule of taxable gross weights set forth in section 41.4482(b)-1(c) of the regulations rather than the actual gross maximum weight of a particular vehicle. Any claims for refund of the vehicle use tax based on the amount of the difference between the weight called for by the schedule of taxable gross weights and the actual gross maximum weight of a particular vehicle will be disallowed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,725

ATLAS TRANSPORTATION COMPANY,

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the Eastern District of Pennsylvania

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Argued January 9, 1959

Before BIGGS, *Chief Judge*, and GOODRICH and STALEY, *Circuit Judges*.

OPINION OF THE COURT

(Filed February 12, 1959)

By GOODRICH, *Circuit Judge*.

This case involves the application of the federal highway use tax for the period July 1, 1956 to June 30, 1957. Plaintiff taxpayer, the appellant here, paid the tax of $202.50 and now seeks to get the money back because it says the tax was improperly collected. The amount involved is small but the point of law involved is important to it and others similarly situated. The case presents

no disputed question of fact. The taxpayer appeals from summary judgment in favor of the Government.[1]

The statute involved imposes a tax on the use of highways by a vehicle of a "taxable gross weight" of more than 26,000 pounds.[2] The term "taxable gross weight" is a new one and is defined in section 4482 so far as this case is concerned as the sum of "(1) The actual unloaded weight of—(A) such . . . vehicle fully equipped for service . . . and (2) the weight of the maximum load customarily carried on . . . vehicles of the same type. . . ."[3] The statute goes on to say the taxable gross weight shall be determined under regulations prescribed by the Secretary, ". . . which regulations may include formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise."[4]

The taxpayer does not quarrel with the statute. Instead, it disputes the validity of the regulations drawn up pursuant to the statutory authority. These regulations, it is claimed, establish a different basis of taxation than that contained in the statute. The argument proceeds further that the regulations are arbitrary as applied to this taxpayer, in that they bear no relation to the weight of the vehicle the use of which is taxed and they provide a conclusive presumption contrary to actual fact, and are, therefore, unconstitutional.

The pertinent regulation divides highway motor vehicles into three primary classifications, namely, single

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[1] The opinion of the district court is reported at 165 F. Supp. 392 (E.D. Pa. 1958).

[2] INT. REV. CODE OF 1954, as amended 70 STAT. 390 (1956), 26 U.S.C. § 4481(a) (Supp. V, 1958).

[3] INT. REV. CODE OF 1954, as amended 70 STAT. 390 (1956), 26 U.S.C. § 4482(b) (Supp. V, 1958).

[4] *Ibid.*

units, combinations and buses.[5] The single unit is the only one which concerns us here.[6] Single units are in turn divided into three species. The first is a two-axled truck equipped for use as a single unit with an actual unloaded weight of 13,000 pounds or more. The other two classifications are for three- and four-axled trucks.[7] They are

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[5] TREAS. REG. § 41.4482(b)-1(c) (1956). *"Schedule of taxable gross weights.* The following schedule of taxable gross weights . . . is hereby prescribed:

USE TAX SCHEDULE

	Taxable gross weight (in pounds)
1. Single Units	
2 axled truck equipped for use as a single unit with actual unloaded weight of 13,000 pounds or more	27,000
3 or 4 axled truck equipped for use as a single unit with actual unloaded weight of at least 13,000 pounds and less than 16,000 pounds	30,000
3 or 4 axled truck equipped for use as a single unit with actual unloaded weight of 16,000 pounds or more	40,000
2. Combinations	
. . .	
3. Buses	
. . .	

Any highway motor vehicle which falls in one of the categories shown in such schedule shall be considered, for purposes of the regulations in this part, to have the taxable gross weight assigned to such category. Any highway motor vehicle which does not fall in one of the categories shown in such schedule shall be considered, for purposes of the regulations in this part, to have a taxable gross weight of 26,000 pounds or less."

[6] Three of the seven classes of trailers ("combinations") specified in the regulations were challenged in the Court of Claims and have been sustained. North American Van Lines, Inc. v. United States, —— F. Supp. —— (Ct. Cl., Jan. 14, 1958).

[7] See note 5 *supra*.

not in our picture here except as reference to the method of classification shows the general plan. Under these regulations a two-axled truck with an actual unloaded weight of at least 13,000 pounds is given a taxable gross weight of 27,000 pounds, bringing it into the group of vehicles subject to taxation.

The taxpayer says that this will not do. It points out that its business, that of furniture moving, has a truck with a cubic foot capacity which is high but that the load weight per cubic foot is much less than in many other kinds of commercial traffic. It shows that under the interstate commerce constructive weight load its moving vans range from 20,730 pounds to 23,830 pounds, far below the 26,000 pounds where the incidence of the tax begins.

While reference to the interstate commerce weight classification is interesting and mandatory with respect to rates and other matters under the control of the Interstate Commerce Commission, it does not bind the Treasury in the imposition of this tax. *Cf. Old Colony R.R. Co.* v. *Commissioner*, 284 U.S. 552, 562 (1932).

There is other evidence, however, which can be taken from the affidavit of Mr. Carl Saal, Chief, Vehicles Operations Branch, Division of Highway Transport, Bureau of Public Roads, which bears on the reasonableness of the classification. Mr. Saal's affidavit says "That the shipping densities of general cargo vary approximately from 10 to 50 pounds per cubic foot. That the customary weight of household goods is less than 10 pounds per cubic foot." The affidavit also states that in developing the taxable gross weight schedules used in the regulations "no attempt was made to distinguish between the various types of goods capable of being hauled by each particular type and weight of power unit, but that figures used represented the normal maximum loads carried by all vehicles of the particular unloaded weight and type."

Suppose that it be assumed, for the purpose of discus-

sion, that the weight of the plaintiff's trucks when loaded with household goods will run less than 27,000 pounds. Does that fact make the classification unreasonable or arbitrary? The taxpayer, itself, admits that a certain amount of averaging is permissible. In fact, a reading of the statutory definition of "taxable gross weight,"[8] reveals not only that averaging is permitted, but that it is required.

The affidavit of Mr. Saal, which is taken as accurate in these proceedings, declares that in promulgating the regulations many factors and many types of evidence were considered. Among these are: "(a) Data submitted by various trucking groups. (b) Bureau of Public Roads loadmeter weight studies. (c) Field data of the Bureau of Public Roads obtained by Interviewing carriers. (d) Manufacturer's specifications, particularly gross vehicle weight ratings, and chassis weights. (e) State weight limits. (f) Technical knowledge of officials of the Bureau of Public Roads." Further, his affidavit states "That in the United States trucking industry as a whole a two-axle van equipped for use as a single unit and having an actual unloaded weight of 13,000 pounds or more customarily has a loaded maximum weight of 27,000 pounds."

The significance of this statement is to show that the classifications were not reached in solitary armchair speculation. Further, there is great practical advantage both for the taxpayer and the taxing authorities in having a classification which is understandable and easy to apply. If that result is to be achieved it is obvious that no one taxpayer can insist that a classification shall be made to fit precisely each of his vehicles or even his vehicles as a group. There are other carriers of goods who use trucks with enormous bodies for carrying lightweigh goods. Pretzel carrying trucks are seen on the streets of Phila-

[8] See text at note 3 *supra*.

delphia every day. While there are no figures available, one may take judicial notice that pretzels weigh less than household goods per unit of size. Can pretzel truck owners insist on a separate classifictaion for themselves?

A regulation to be valid does not have to be the only way to classify in the administration of tax law. It can be agreed that there are other methods which might have been adopted here. What must be balanced is the advantage of convenience in assessment and collection with admitted inaccuracies in some individual instances. The method adopted by the Treasury seems to us an intelligent balance of the accurate and the practical in accord with the Congressional intent.

The taxpayer's argument that the regulations provide a conclusive presumption contrary to actual fact, citing *Schlesinger* v. *Wisconsin*, 270 U.S. 230 (1926), and *Heiner* v. *Donnan*, 285 U.S. 312 (1932), is not accurate. The regulation does not conclusively presume that taxpayer's trucks weigh 27,000 pounds each. It may well grant that on some, perhaps many occasions, they may weigh less. Instead, the regulation puts the trucks into a classification and subjects them to taxation as if they did weight 27,000 pounds. The criterion is not weight in pounds as scales would show it, but the application of the legislative concept "taxable gross weight," which is not the same thing at all. If the classification is not unreasonable, the tax is good. No conclusive presumption of facts is involved.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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JAMES R. BROWNING,

No. 919

In the Supreme Court of the United States

OCTOBER TERM, 1958

ATLAS TRANSPORTATION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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CHARLES K. RICE,
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---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 20a-27a)* is reported at 165 F. Supp. 392. The opinion of the Court of Appeals (Pet. 28-33) is reported at 263 F. 2d 573.

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 1959. The petition for a writ of

* Record references are to the Appendix to the taxpayer's brief in the Court of Appeals. References to Supp. R. are to Appendix B to the Government's Court of Appeals brief.

certiorari was filed on May 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the schedule of "taxable gross weights" contained in Treasury Regulations on Highway Motor Vehicle Use, Section 41.4482(b)-1, as promulgated and applied by the Commissioner of Internal Revenue, is a valid exercise of the authority expressly vested in the Commissioner by Section 4482(b) of the Internal Revenue Code of 1954.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Sections 4481(a), (b), (c), (d) and (e) and 4482(a) and (b) of the Internal Revenue Code of 1954 and Section 41.4482 (b)-1 of Treasury Regulations on Highway Motor Vehicle Use are printed in the Appendix of the brief in opposition filed on behalf of the United States in *North American Van Lines, Inc.* v. *United States of America*, No. 838, this Term.

STATEMENT

During the fiscal year ending June 30, 1957, the taxpayer owned and operated five highway motor vehicles, each of which was a two-axle van equipped for use as a single unit with an actual unloaded weight of 13,000 pounds or more. These vehicles were used by the taxpayer in its business as a common carrier of household goods. (Pet. 31; R. 20a.)

Sections 4481 and 4482 of the Internal Revenue Code of 1954 impose a tax at the rate of $1.50 per

thousand pounds of "taxable gross weight" on the use of all highway motor vehicles with a taxable gross weight in excess of 26,000 pounds. As pertinent here, Section 4482(b) defines taxable gross weight as the sum of the unloaded weight of a motor vehicle plus the weight of the maximum load customarily carried on vehicles of the same type. This section also specifically grants authority to the Secretary of the Treasury to determine taxable gross weights by Regulations, including "formulas or other methods for determining the taxable gross weight of vehicles by classes, specifications, or otherwise." Pursuant to this authority, Regulations were adopted setting forth a schedule of taxable gross weights. Section 41.4482 (b)-1 of Treasury Regulations on Highway Motor Vehicle Use. This schedule divides all highway motor vehicles into three primary classifications, namely, single units, combinations, and buses. Single units are further subdivided into three types lettered A through C, and, as required by Section 4482(b), a specified taxable gross weight is attributed to each type. Vehicles such as those operated by the taxpayer fall within type A of this schedule, with a taxable gross weight of 27,000 pounds.

Uncontroverted affidavits submitted to the District Court established that, while the actual loaded weights of the taxpayers' vehicles were substantially less than 26,000 pounds, (1) the classifications contained in the Treasury Regulations are recognized by both the commercial trucking industry and the Bureau of Public Roads, and (2) in the United States trucking industry as a whole vehicles of the type

operated by the taxpayer customarily have a maximum loaded weight of 27,000 pounds. (Pet. 31-32; R. 11a-14a; Supp. R. 1b-5b.)

The taxpayer computed and paid a highway use tax of $202.50 for the fiscal year ending June 30, 1957, on the basis of the classification of taxable gross weights prescribed in the Regulations, and subsequently brought this action for a refund because its loaded vehicles actually weighed less than 26,000 pounds. (Pet. 28.) Both the District Court (R. 20a-27a) and the Court of Appeals (Pet. 28-33) held that the tax was properly collected.

ARGUMENT

The question here is the same as in *North American Van Lines, Inc.* v. *United States*, No. 838, in which this Court denied certiorari on June 1, 1959. There is no more occasion for further review of this case than of that one. The decision below, affirming that of the District Court, is in accord with the decision of the Court of Claims in *North American* (169 F. Supp. 252), and concededly (Pet. 7) there is no conflict. The contentions which taxpayer advances here are substantially the same as those advanced in *North American*, and we respectfully refer the Court to the Government's brief in opposition in No. 838.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1959.

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